Recent Developments in Mass Tort Practice: Good News for the Defense

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GOOD NEWS FOR THE DEFENSE

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In recent years, any defendant faced with a mass tort could be assured of seeing at least two predictable attack strategies coming from the organized plaintiffs’ bar. First, at least some group of plaintiffs could be relied on to file and seek early trial dates for cases in plaintiff-friendly jurisdictions (like Texas, West Virginia or Mississippi), known for handing out large punitive damages awards. Second, plaintiffs almost always sought certification of either state or nationwide classes—often for non-injury medical monitoring claims, but sometimes also for personal injury damages. This spring, however, two decisions appear to beat back those threats and hold the potential to significantly impact the future of mass tort litigation. The first case, State Farm Mutual Automobile Insurance Co. v. Campbell, ___ U.S. ___,123 S.Ct. 1513 (2003), substantially limits plaintiffs’ ability to recover break-the-bank punitive damages against corporate defendants. Liggett Group Inc. v. Engle, 2003 WL 21180319 (Fla. Dist. Ct. App. May 21, 2003), rejected the use of the class action vehicle to litigate smokers’ personal injury claims, and also followed State Farm in holding that the amount of punitive damages awarded to an improperly certified class was excessive to the point of violating due process.

State Farm arose out of a bad faith auto case tried in state court in Utah. Curtis Campbell was driving on a two-lane highway when he decided to pass six vans traveling ahead of him. Todd Ospital was coming the other way. To avoid a head-on collision with Campbell, Ospital swerved off the road, colliding with a third vehicle, driven by Robert Slusher. Ospital
was killed and Slusher permanently injured. Campbell and his wife, who was a passenger in his car, escaped unharmed.

In the ensuing litigation, Ospital’s estate and Slusher offered to settle for the policy limit of $50,000. But State Farm, Campbell’s insurer, refused. Following a verdict in excess of the policy limit, Campbell settled, agreeing in part to pursue a bad faith claim against State Farm. At the trial of the bad faith claim, the court admitted evidence of a 20-year nationwide scheme by State Farm to reduce its payouts to insureds by contesting legitimate claims, altering claim files, harassing claimants (including those, like Campbell, deemed financially vulnerable) and otherwise engaging in conduct clearly tortious under Utah law. The jury awarded plaintiff $1 million dollars in compensatory damages and punitives of $145 million, which the trial court reduced to $1 million in compensatories and $25 million in punitives. The Utah Supreme Court reinstated the full punitives award and the U.S. Supreme Court granted certiorari.

In an opinion delivered by Justice Kennedy, the Supreme Court reaffirmed its right to review de novo the constitutionality of punitive damages awards. It also reaffirmed its adherence to the “guideposts” set out in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), for use in judging the appropriateness of a punitive award. Specifically, it stated that courts must look to (1) the degree of reprehensibility of the defendant’s misconduct; (2) the difference between the actual or potential harm suffered and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. It then went on to explain the significance of those guideposts in actual practice, setting forth several “rules” of potentially great benefit to mass tort defendants.
First, despite continuing to insist that there is no bright-line ratio for calculating an acceptable punitive damages award, the Court reiterated that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 123 S.Ct. at 1524. Second, the Court held that a defendant cannot be punished for out-of-state conduct that is not rationally related to the particular plaintiff whose claims are being tried, and that may not even be unlawful in the state where it occurred. Last, *State Farm* explained that a company’s wealth cannot be used to justify an otherwise unconstitutionally large punitive damages award. Punitive damages that bear no relation to the degree of culpability of the harm suffered can not be justified on the theory that the company will not feel or be deterred by a lesser sanction.

In *Engle*, the Florida Court of Appeals reversed a state trial court’s decision to (1) certify a statewide smokers’ personal injury class and (2) conduct a bellwether-type trial that resulted in a $12.7 million compensatory award for three individual plaintiffs and a $145 billion punitive damages award for the class. First, the Court of Appeals struck the certification order generally, finding that the personal injury plaintiffs could not satisfy the commonality requirement for class action treatment and that a class action was not a superior method of adjudicating plaintiffs’ claims. Second, the Court of Appeals rejected the idea that defendants’ punitive liability could be determined on a classwide basis without first deciding whether, and to what extent, defendants owed compensatory damages to each individual class member—something that plaintiffs did not even try to prove. It further held that a punitive damages award 18 times the defendants’ proven net worth could not possibly bear a reasonable relationship to the actual harm inflicted on the plaintiffs or to an amount needed to deter future conduct.

Taken together, *State Farm* and *Engle* are a significant deterrent to plaintiffs who think that they can hold mass tort defendants hostage with the threat of run-away punitive
damages verdicts, obtained either by (1) introducing evidence of conduct relevant to other supposedly-like plaintiffs who are not actually before the court, and/or by aggregating claims through class action or other mechanisms. In fact, defendants now can and do argue that the impact of these decisions goes well beyond their four corners and affect a host of trial and pre-trial issues critical to mass litigation.

For example, it may be that high-level corporate policy decisions of all kinds, made at out-of-state headquarters, cannot support a punitive damages finding absent clear proof that the policies actually impacted the particular plaintiff’s use of the product or the harm suffered. Or, at a minimum, defendants may argue that jurors should not hear unflattering examples of how such broad corporate directives have played out in circumstances and locations other than those directly relevant to the plaintiff. Such high-level decisions and their implementation historically are at the heart of a plaintiff’s punitives case, the idea being that the bad acts went to the very highest levels and across all segments of the company. But under the logic of State Farm, such conduct may not meet the relevance threshold and so may not be appropriate for consideration.

It also may be that irrelevant conduct of the type that now often gets heard in mass tort cases—such as conduct involving a different time period, dosage, formulation, brand, or marketing region—is less likely to come in because of fear that it is not sufficiently relevant and yet could taint the jury’s punitives assessment. Similarly, evidence of bad acts by multiple individuals within a company, which plaintiffs might try to put together to show a pattern or practice of misdeeds, should be kept out if there is no evidence that the acts all linked up to directly affect the plaintiff’s case.

Just as State Farm narrows what jurors may hear about a defendant’s conduct, it also should limit what juries learn about a defendant’s financial status. Plaintiffs should no
longer be permitted to argue punitives based on total corporate assets or gross profits, as too much of any such number would be derived from conduct having nothing to do with any individual plaintiff’s case. The same logic should even preclude a jury from considering nationwide sales figures (or even net profits) resulting from the particular product or business activity at issue. A better measure, in light of State Farm, would be net profits for the “relevant” geographic area and relevant product—which may limit the plaintiff to intra-state (or even smaller area) activities. In many cases, this may move the number the jury bases its punitive verdict on from something in the millions or billions of dollars to something in the hundreds or even tens of thousands of dollars.

State Farm also makes less appealing plaintiffs’ prior strategy of using a weak compensatory damages case to get a huge punitives verdict somewhere like Texas or West Virginia, on the theory that doing so will “establish the value” for the whole litigation. First, the idea that the Due Process Clause engrafts a punitives cap of no more than nine times compensatories may make it hard for any jury to “send a message” of national significance with a single case—particularly a weak one. Moreover, State Farm should be read as requiring judges to instruct jurors that they are prohibited from punishing any conduct that is not directly at issue in the case at bar. So no jury should see itself as taking on the duty of punishing nationwide business practices. In addition, practical experience teaches that when jurors are forced to focus on the facts of individual plaintiffs’ claims and not on defendants conduct in the abstract, they are less likely to feel the kind of anger that leads to run-away awards.

Going beyond just the issue of punitives, the language of Engle argues that a variety of novel trial plans of the type courts are tempted to use in mass litigation should be recognized as fatally flawed. Specifically, plans for bellwether trials, “generic” or single issue trials (i.e., one-sided trials to assess the alleged culpability of defendants’ “generic” conduct
unrelated to any particular plaintiff), or trials of selected “group” claims, should now be viewed with far greater skepticism. Of course, all of these trials tend to favor plaintiffs because they focus juries on what defendants did wrong without any context for why the plaintiffs’ side of the story has problems too.

Last, it will be interesting to see how *State Farm* impacts the practice among mass tort plaintiffs’ lawyers of filing suits in a friendly forum, far from where their clients live or suffered any injury. *State Farm* and *Engle* both note the many choice of law problems that arise when a court in one state purports to take on the burden of determining a defendant’s punitive damages liability for out-of-state conduct. But the logic applies equally to compensatory verdicts. In light of these holdings, judges may be more ready to recognize the problems that come with litigating matters for multiple far-flung plaintiffs and may be more willing to send those cases back to the plaintiffs’ home states.

Finally, *State Farm* may have broad implications for discovery, before a case ever gets to trial. Plaintiffs in mass tort cases often, for example, serve broad requests for confidential corporate financial information, including information regarding net worth, total profits and losses, and/or nationwide product sales figures. To support these requests, they argue that the information is reasonably calculated to lead to the production of admissible evidence on punitive damages.\(^1\) In light of *State Farm* and *Engle*, defendants should now be in a much better position to argue that such discovery is grossly over-broad and unduly burdensome and not reasonably calculated to lead to the production of any punitive damages figure that can be offered for any particular plaintiff’s case. Indeed, it may well be argued that discovery of such information is not appropriate at all during the generic discovery phase of any mass tort (as is now often the

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\(^1\) The same is true for requests going to “corporate practices”—sometimes dating back decades and crossing product lines.
practice), but rather should be held until just before trial and done on a case-by-case basis, limited to the narrowly defined relevant market for a particular plaintiff’s case.

So what’s left? *State Farm*, it should be remembered, arose out of a bad faith auto case where the damages were all economic; it does not actually involve a personal injury mass tort. And plaintiffs eagerly point out that the Court left open the possibility that personal injury cases could justify larger punitive awards. Moreover, some may argue that *State Farm* should be narrowly read as a case about the admissibility of certain evidence for purposes of proving a right to punitive damages. But whether, in the real world, the same kind of evidence might come in for other stated purposes and influence juries through the back door remains to be seen. As for *Engle*, some may dismiss it as limited by its facts. They may say that the unique nature of tobacco litigation generally, and the highly unusual trial plan implemented by the Florida court specifically, make the case unlikely to bear much on other kinds of mass litigation.

But whatever might be said to try to minimize or marginalize these decisions, defense lawyers should see them as major achievements. Many of the procedures developed in mass litigation arose out of efforts to grapple with large groups of claims where one-by-one handling was perceived as hindering plaintiffs’ ability to have their day in court. But the pendulum swung much too far in the other direction, with the “if we build it they will come” mentality of litigation ruling the day. *State Farm* and *Engle* attempt to put some rational limits on litigation-building efforts and allow cases to be resolved in a way that is not merely a reaction to the fear of run away verdicts.